

God and Religion in the Preamble of Constitutions

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1. Introduction

The foiled London plot of jihadists who planned to blow up nine airplanes in the summer of 2006 was, in a sense, a victory in the struggle against radical Islam or Islamism.¹ Nevertheless, it also left the British with a sense of disillusion, because it had been proved again that Britain had incubated home-grown terrorists: young people estranged from their country, ready to attack their land and its people for violating the precepts of an extremist ideology. The British government inaugurated a commission to enquire whether the traditional multiculturalist approach was still the most viable way to foster a sense of British citizenship.² An increasing number of commentators felt that multiculturalism seems to divide³ the country into a plurality of religious and ethnic communities and undermines the idea of a common national loyalty to the British state and society.⁴ Britain, many people felt, had been creating a terror state from within by giving ample opportunity to radical religious preachers who seduced youngsters into a radical and violent religious ideology.

It seems that finally the United Kingdom, the most multicultural country in the West,⁵ is reconsidering the double loyalties that multiculturalism inaugurates. On 14 January 2006, Gordon Brown, Chancellor of the Exchequer, held a speech at the Fabian New Year Conference, London. He asked the following question: 'Should we do more to define a positive sense of Britishness?'⁶ And his answer was: yes. Once again, it has been terrorist acts that have given the British – like the Americans – food for thought. Since 7 July 2005, the balance between diversity and integration has had to be reconsidered. According to Brown, you should have a clear view of what being British means, what you value about being British and what gives us purpose as a nation. Brown argues that British values call for a new constitutional settlement and renewed civic patriotism.

Brown also issues a warning. When people are insecure, he says, there is always a risk that they retreat into more exclusive identities rooted in 19th-century conceptions of blood, race and territory. What people tend to forget is that we should

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¹ Evan Thomas, 'The New Age of Terror', *Newsweek*, 21 August 2006.

² 'Multiculturalisme niet meer heilig in Groot-Britannië', *Trouw*, 25 August 2006.

³ Arthur Schlesinger, Jr., *The Disuniting of America. Reflections on a Multicultural Society, Revised and Enlarged Edition*, New York and London, 1998 (1991).

⁴ For a radical critique of multiculturalism, see Melanie Phillips, *Londonistan. How Britain is Creating a Terror State Within*, London 2006.

⁵ On this subject, see Dominique Thomas, *Le Londonistan. Le djihad au coeur de l'Europe*, Paris 2005.

⁶ Speech by the Rt Hon Gordon Brown MP, Chancellor of the Exchequer, at the Fabian New Year Conference, London, 14 January 2006.

celebrate a British identity that is bigger than the sum of its parts and that a union is strong because of the values we share. Race and ethnicity are not a basis for a common British identity. Even though the British response to the events of 7 July was magnificent, we have to face the uncomfortable fact that there were British citizens, British born, apparently integrated into the British community, who were prepared to 'maim and kill fellow British citizens, irrespective of their religion'. That means that we have to be 'far more ambitious in defining for our time the responsibilities of citizenship'. If we do not promote Britishness, we run a real risk of having a divided society. 'And this British patriotism is, in my view, founded neither on ethnicity nor race, not just on institutions we share and respect, but on enduring ideals which shape our view of ourselves and our communities – values which in turn influence the way our institutions evolve.' What then are the values that Brown defines? Brown summarizes these as follows: 'Liberty for all, responsibility by all and fairness to all.'

Countries like Britain seem to have serious problems regarding social cohesion, but the problems manifest themselves in other countries as well. After the murder of the Dutch filmmaker and columnist Theo van Gogh, the German politician Dieter Wiefelspütz (SPD) warned his compatriots against self-complacent musings. He said, '*Holland ist überall*'.⁷ What had happened in the Netherlands could happen everywhere, in Germany as well.⁸ This may be a bit exaggerated because there are countries with a much more homogeneous population. Nevertheless, most European countries have a multicultural population. In most of these countries, multiculturalism has been the official ideology.⁹ Most of these countries have problems with the integration of religious and ethnic minorities.

The topic I want to address in this contribution is in what sense constitutional devices can help to foster an idea of a common identity. A preamble of a constitution usually defines the guiding ideas and principles of a national community. It gives the people a political sense of direction. The question is, of course, what should be the contents of this preamble. The most recent discussion on this question in Europe centered on the European Constitution. As is well-known, this Constitution floundered, but this does not make the elaborate discussion on the Preamble of this Constitution irrelevant. On the contrary. This was a highly important debate on the question whether the Preamble of the Constitution should be religiously neutral or whether it should include a reference to the religions that have shaped European history, state and society. In this contribution, I will highlight the problems connected with religious references in the European Constitution, and in constitutions in general. I will argue that the multicultural composition of European states points in the direction of a religiously neutral preamble. This means that the French laicist approach is more viable as a source of inspiration for future constitutional experiments than the British multicultural approach.

Let us first shoot a glance at the Preamble of the European Constitution.

⁷ Hans Steketee, '*Holland ist überall*' als schrikbeeld', *NRC Handelsblad*, 17 November 2004.

⁸ The same point is made by Günter Lachmann, *Tödliche Toleranz*, Munich / Zürich, 2004.

⁹ With respect to Germany, see, for instance, Bassam Tibi, *Europa ohne Identität? Leitkultur oder Wertebeliebigkeit*, 2nd ed., Munich 2001 (1998).

there is no justification for referring to these characteristics and at the same time presenting these as a plea for the Judeo-Christian tradition (and leaving Islam unmentioned), as the Dutch Prime Minister Balkenende does.

On 4 and 5 October 2003, an Inter-Governmental Conference was held in Rome. During this conference, the Dutch government argued that the Preamble should include a reference to the Judeo-Christian tradition.¹⁴ This was the all more remarkable, because this plea was in stark contrast to the explicit wishes of the Dutch Parliament.¹⁵

The World Council of Churches was also in favor of the *invocatio Dei* in the preamble. It even waged a polemic against 'other creeds'. The Council stated, 'Christianity and other creeds should not be put on the same level', because 'Christianity had a decisive influence on the European soil'.¹⁶

Christianity and other creeds are not equal? This was a flat denial of politically correct speech codes according to which all religions should be considered equally valuable.¹⁷ Some people angrily replied that the World Council tried to minimize the influence of the other denominations, but, when asked for clarification, the World Council retreated from this firm and politically incorrect stance. The World Council said it only wanted to stress the importance of Christianity, not to belittle the position of other beliefs. The Nordic member of the Board of the World Council, Trond Bakkevig, even wanted a reference to ancient Greek religion because of the significance of ancient Greece for the development of democracy. Apparently, Bakkevig is of the opinion that if Greece invented democracy, this invention must be attributed to Greek *religion*. But what the Greek pantheon has done for democracy is far from clear. The claim that it was secular Greek philosophy that laid the foundations for Greek popular government seems more likely, although Bakkevig did not even *consider* this an option.¹⁸

2. Where were the Secularists?

Non-governmental commentators participated in the discussion on the European Constitution, too. One of the most remarkable was the Dutch intellectual Lambert J. Giebels. He blamed the commission chaired by Giscard d'Estaing for 'a complete forgery of history'.¹⁹ According to Giebels, European history simply coincides with the development of Christianity. 'From whatever angle you want to reflect on the issue: even the most convinced European agnostic cannot deny that we have a Christian calendar and Christian holidays, like Christmas and Easter, that determine

¹⁴ 'VVD dreigt met 'nee' bij referendum EU-grondwet', *NRC Handelsblad*, 6 October 2003.

¹⁵ Floris van Straten, 'Senaat broemt over geloofsverwijzing', *NRC Handelsblad*, 5 November 2003.

¹⁶ 'Christendom als wortel van Europa', *Trouw*, 2 September 2003.

¹⁷ Paul Berman (ed.), *Debating P.C. The Controversy over Political Correctness on College Campuses*, New York 1992; Jean Sévilla, *Le Terrorisme Intellectuel de 1945 à Nos Jours*, Paris 2004 (2000).

¹⁸ Eric W. Robinson, *Ancient Greek Democracy. Readings and Sources*, Oxford, 2004; Richard Taylor, *Restoring Pride. The Lost Virtue of Our Age*, Buffalo, New York 1996; Richard Taylor, *Ethics, Faith, and Reason*, Englewood Cliffs, New Jersey 1985; Charles Freeman, *The Greek Achievement. The Foundation of the Western World*, New York 1999, p. 55 ff.

¹⁹ Lambert J. Giebels, 'Europese grondwet', *NRC Handelsblad*, 7 July 2003.

Needless to say, the Catholic view as cited above was not prevalent during the meetings on the European Constitution. The opponents of the radical separation of church and state had not triumphed and were forced on the defensive. Secularists had won their cause and the only thing they had to do is to enter the debate when some governments, i.e. that of Poland, tried to counter the French chairman's secularist leanings with any chance of success. When Poland protested against the radical separation of church and state, according to the French principles, two hundred Polish intellectuals criticized their government in an open letter on the European Constitution. In contrast to their government, these intellectuals did *not* want a reference to God or Christianity in the European Constitution. 'We want a Europe that upholds the common values, such as freedom, equality and solidarity, but we do not need any reference to the sources of these values, because we do not want to exclude people or estrange people from us.'²²

On 4 November 2003, the Dutch finished their discussion of the problem during a debate in the Upper House. Prime Minister Jan Peter Balkenende defended his stance on the Intergovernmental Conference on 4 and 5 October 2003, where – in defiance of Parliament's wishes – he had argued in favor of a reference to the Judeo-Christian roots of European civilization. The Prime Minister was irritated especially by the reference to 'humanism' in the Preamble. It would be unhistorical to ignore the Judeo-Christian traditions, while mentioning the humanist roots, according to Balkenende.

Social-democrat senator Erik Jurgens opposed the Prime Minister with two arguments. First, Jurgens contended that we do not need a preamble at all. The Dutch Constitution does not have a preamble after all. Many other European constitutions do not have a preamble either. Why do we need a preamble in Europe? Second, Jurgens contested the claim that we need a reference to the Judeo-Christian roots of European culture, as Balkenende had argued. Erasmus was a humanist, Jurgens said. Contemporary humanism incorporated the values of Judeo-Christian culture. This plea for a secularist approach was all the more interesting, because Jurgens made clear that he was not motivated by atheist considerations. He was a Catholic and yet in favor of the secular state.²³

3. The Preamble in National Constitutions: Five Types of Constitutions

Jurgens's contribution to the debate in the Upper House of the Dutch Parliament put one interesting point on the agenda. Do we need a preamble at all? And if so, what should be the content of the preamble?

In answering this question, it may be helpful to analyze the preambles of five models of national constitutions and consider the pros and cons of the different models, in particular with reference to the preamble.

²² 'Polen en Europa', *NRC Handelsblad*, 14 October 2003. A complete list of subscribers is to be found on the website of *Gazeta Wyborcza*: www.gazeta.pl

²³ Not unlike the 19th century political philosopher Lamennais (1782-1854) in his second phase of development (from 1830 onwards). See Félicité de Lamennais, *Introduction et notes de Louis Le Guillou, Paroles d'un Croyant*, Paris 1973 (1834).

A full-blown commitment to religion is to be found in the Constitution of Saudi Arabia, adopted in March 1992. Here the Constitution is explicitly subordinated to divine law. 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion', the Preamble states. It follows with: 'God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its Constitution.' Not only the Preamble but also the whole Constitutional text is interspersed with references to God and religion. Article 2 describes the inscription on the Saudi flag: 'There is but one God and Mohammed is His Prophet'. Article 6 says that citizens are to pay allegiance to the King 'in accordance with the Holy Koran and the tradition of the Prophet, in submission and obedience'. According to Article 7, political power is derived directly from the Holy Koran and the Prophet's tradition. Article 8 proclaims that government will be in accordance with the Islamic Shariah. Article 9 proclaims the family as the kernel of Saudi society. It continues with: 'and its members shall be brought up on the basis of the Islamic faith, and loyalty and obedience to God, His Messenger, and to guardians'. Article 10 states that the state will aspire to strengthen family ties and maintain its Arab and Islamic values. Article 11 underlines that Saudi society 'will be based on the principle of adherence to God's command'. Article 13 states: 'education will aim at instilling the Islamic faith in the younger generation.'

Sometimes religious leanings in the constitutional framework do not have any basis in the preamble. This is the case in the Constitution of Yemen. The Constitution of Yemen of 1991 does not have a Preamble. Nor is the true religious orientation of the Constitutional order manifest from the first article of the Constitution: 'The Yemen Republic is an independent, sovereign, unitary, and indivisible state whose territorial integrity is inviolable. The Yemeni People is a part of the Arab nation and the Islamic world.' But Article 2 states: 'Islam is the religion of the state and Arabic is its official language.' Article 3: 'Islamic jurisprudence is the main source of legislation.'

3.4 Constitutions of the Fourth Type: Multiculturalism

The fourth type of constitution is what I would like to call the 'multiculturalist brand'. The Preamble of the Constitution of Poland of 1997 constitutes the ideal compromise for many people, because it mentions faith and non-faith. The Preamble runs as follows:

'Having regard for the existence and future of our Homeland, Which recovered,
in 1989, the possibility of a sovereign and democratic determination of its fate,
We, the Polish Nation – all citizens of the Republic,
Both those who believe in God as the source of truth, justice, good and beauty,
As well as those not sharing such faith but respecting those universal values as
arising from other sources,
Equal in rights and obligations towards the common good – Poland,
Beholden to our ancestors for their labors, their struggle for independence
achieved at great sacrifice, for our culture rooted in the Christian heritage of the
Nation and in universal human values,
Recalling the best traditions of the First and the Second Republic,

Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage,
 Bound in community with our compatriots dispersed throughout the world,
 Aware of the need for cooperation with all countries for the good of the Human Family,
 Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland,
 Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies,
 Recognizing our responsibility before God or our own consciences,
 Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of aiding in the strengthening the powers of citizens and their communities.
 We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.'

I call this 'multiculturalist' not because any reference is made to ethnic or religious minorities,²⁵ but because the Polish Constitution tries to harmonize secularist and non-secularist traditions that found a place in many preambles. As we have seen, some commentators are very enthusiastic about the Polish compromise. Even so, there are fierce critics as well. Kaz Działka, professor of American Studies and of Polish origin, is very critical of the Polish Constitutional order and the Polish Constitution in particular.²⁶ He calls Poland a 'neo-theocracy'. The Polish 'Christian heritage' began only a millennium ago, resulting in the tragic destruction of Slavic culture and religion. 'When a baby is born, a couple marries, or a person dies, there is invariably a Polish Catholic priest at hand to quote the Bible and to collect a fee. In Poland it is becoming increasingly rare not to have a monument dedicated, a new school opened, or even a car purchased without its being consecrated by a cassock-clad personage wielding an aspergillum (also a fee, of course).' When America's young democracy was threatened by Patrick Henry's bill to establish a provision for the teachers of Christianity, it was James Madison who averted the danger by arguing against legal support for the Christian religion.²⁷ Sadly there are no Madisons or Jeffersons in the Warsaw Belweder (the Polish President's residence) and the influence of the Catholic Church is visible everywhere.

²⁵ On this kind of multiculturalism, see Will Kymlicka, *Liberalism, Community and Culture*, Oxford 1991 (1989); Brian Barry, *Culture & Equality. An egalitarian critique of multiculturalism*, Cambridge 2001; Gerd Baumann, *The Multicultural Riddle. Rethinking national, ethnic, and religious identities*, New York and London 1999; Andreas Kinneging, 'Multiculturalisme, relativisme en mensenrechten', in P.B. Cliteur & V. Van Den Eeckhout, eds., *Multiculturalisme, Cultuurrelativisme en Sociale Cohesie*, The Hague 2001, pp. 9-103.

²⁶ Kaz Działka, 'Polish prelates turn back the clock', *Free Inquiry*, Vol. 22, Issue 2, 1 April 2002.

²⁷ James Madison, 'Memorial and Remonstrance against Religious Assessments', in James Madison, *Writings*, New York 1999, pp. 9-39.

Another commentator, Andrzej Flis, professor of sociology at Jagiellonian University in Cracow, states that after the communist era had ended, Poland was launched down the road leading back to an ideological state. 'The bishops decided to fill the post-Marxist doctrinal vacuum with Catholic fundamentalism.'²⁸ There is religious instruction in state schools. According to Wojciech Lamentowicz, democratic values should be protected by a powerful, authoritarian church rather than a powerful, authoritarian state. Adam Michnik warned against the impending 'Iranization' of the country. Sometimes the Polish Church acknowledges confessional influence as well. Cardinal Jozef Glemp, the Primate of Poland, stated that the country was choosing between two systems of values: Christian and neopagan.

3.5 Constitutions of the Fifth Type: Secular or Laicist

Finally, there are the constitutions that are inspired by secularist ideas on the separation of church and state. The Constitution of the French Republic is, of course, the best-known, but it is not the only example. The French 1958 Constitution starts with the following Preamble.

'The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the preamble to the Constitution of 1946. By virtue of these principles and that of the self-determination of Peoples, the Republic offers to the overseas territories that express the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.'

The important secular direction of the French Constitution is not shown by the Preamble, but by the first article of the Constitution. There we find: 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.'

A second example of a constitution with a secular orientation is the Turkish Constitution.²⁹ The Preamble includes a reference to 'the modernism of Atatürk' and the 'principle of secularism', defined as:

'There shall be no interference whatsoever of the sacred religious feelings in State affairs and politics'. Atatürk is called 'the immortal leader and the unrivalled hero' who put the Turkish Republic on the track of this principle (here we find an element of what I have called the second type of constitutions: constitutions with historical and ideological references). The preamble states that no individual or body empowered to exercise the sovereignty in name of the nation 'shall deviate from liberal democracy and the legal system instituted according to its requirements.'

²⁸ Andrzej Flis, 'The Polish church as the enemy of the open society', *Free Inquiry*, Vol. 17, No. 1 January 1996.

²⁹ Bernard Lewis, *The Emergence of Modern Turkey*, Third Edition, Oxford and New York 2002 (1961), p. 02 ff.

There is also a reference to secular ideals in the Preamble to the Constitution of India:

'We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation; in our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this constitution.'

Finally, reference has to be made to the Italian Constitution. Italy is a Catholic country, but the Constitutional order has a laicist orientation. Article 1 of the Constitution informs us about the form of the state: (1) Italy is a democratic republic based on labor. (2) The sovereignty belongs to the people who exercise it in the forms and limits of the Constitution. Article 7 addresses the relationship between church and state:

'(1) State and Catholic Church are, each within their own reign, independent and sovereign. (2) Their relationship is regulated by the Lateran Pacts. Amendments to these pacts which are accepted by both parties do not require the procedure of constitutional amendments.'

Article 8 states:

'(1) Religious denominations are equally free before the law. (2) Denominations other than Catholicism have the right to organize themselves according to their own by-laws, provided they do not conflict with the Italian legal system. (3) Their relationship with the state is regulated by law, based on agreements with their representatives.'

4. Criticism of Secularism

Although still an important source of influence in the European Convention, secularism has attracted severe criticism in the last few decades.³⁰ Probably, this has to do with the failed attempts at forced secularization in the Soviet Union and former Eastern Bloc countries,³¹ and perhaps also with the criticism of some forms of 19th century atheism and agnosticism.³² The recent revival of fundamentalist movements

³⁰ See David N. F. Gellner, 'Studying secularism, practising secularism. Anthropological perspectives', *Social Anthropology*, Vol. 9, No. 3, 2001, pp. 37-340; Lale Yalçın-Heckmann, 'Three points on secularism and anthropology', in *Social Anthropology*, Vol. 9, No. 3, 2001, pp. 34-336.

³¹ Paul Froese, 'Forced Secularization in Soviet Russia: Why an Atheistic Monopoly Failed', *Journal for the Scientific Study of Religion*, 43:1 (2004), pp. 5-40.

³² On 19th century secularist traditions, see Mark Bevir, 'Annie Besant's Quest for Truth: Christianity, Secularism and New Age Thought', in *Journal of Ecclesiastical History*, Vol. 50, No. 1, January 1999, pp. 2-93; A.N. Wilson, *God's Funeral*, London 1999; A.N. Wilson, *The Victorians*, London 2002;

have also challenged the secularization thesis.³³ Other people criticized the idea of the secular state with regard to government-sponsored education facilities.³⁴

The problem is that secularism is much too vague a concept. The term was coined by George Jacob Holyoake (1817-1906) in 1842. He tried to introduce 'secularism' as an alternative to 'atheism', which he considered to be too negative.³⁵ Secularism should focus on the problems of this world rather than the next.

This attempt to introduce less controversial terminology has failed, however, because nowadays the term 'secularism' is just as vague as 'atheism' and equally overloaded with negative associations. In this contribution I can't not go into the many aspects of secularism, but dwell on one specific aspect only: the idea that the state has to be religiously neutral. And that neutrality means an orientation on universal and objective norms that are acceptable to all the citizens within the political order. In this sense, secularism is not necessarily connected with atheism. A secular state can be advocated by Christians, Muslims, Jews and representatives of other denominations. The secularist contends that an 'open society cannot be based on a religious model of social cohesion that is always particularistic although it pretends to be universalistic.'³⁶

5. Joseph Weiler's Postmodern Confessional Multiculturalism

One of the most remarkable contributions to the debate on the Preamble of the European Constitution was an essay written by the orthodox Jewish scholar J.H.H. Weiler.³⁷ Born to a Jewish father in South Africa, Weiler is a constitutional scholar, who, according to the editors of an important essay on the Preamble of the European Constitution, 'takes his belief seriously'.³⁸ He is also an authority in the field of European law and a professor at New York University. In 2003, Weiler published

Alister McGrath, *The Twilight of Atheism. The rise and fall of disbelief in the modern world*, New York etc. 2004.

³³ Daniel Philpott, 'The Challenge of September 11 to Secularism in International Relations', *World Politics*, 55 October 2002, pp. 6-95; Jan Tarik, 'Mawdudi's Critique of the Secular Mind', *The Muslim World*, Vol. 93., July/October 2003, pp. 03-519; Terrance G. Carroll, 'Secularization and States of Modernity', *World Politics*, Vol. 36 No. 3 (April 1984), pp. 62-382.

³⁴ For instance: B.C. Labuschagne & H.-M. T. D. ten Napel, 'Overheidsfacilitering voor godsdienstige denominaties', in P.B. Cliteur & V. Van Den Eeckhout, eds., *Multiculturalisme, Cultuurrelativisme en Sociale Cohesie*, The Hague 2001, pp. 53-471; H.M.Th.D. ten Napel, 'A brick from the wall': Zelman v. Simmons-Harris et al. en het einde van de strikte scheiding tussen kerk en staat op onderwijsgebied in Amerika', in P.B. Cliteur & H.-M.Th.D. ten Napel (eds.), *Rechten, Plichten, Deugden*, Nijmegen 2003, pp. 85-193.

³⁵ George Jacob Holyoake and Charles Bradlaugh, 'Is Secularism Atheism?', in Gordon Stein, *A Second Anthology of Atheism and Rationalism*, Buffalo, New York 1987, pp. 45-369.

³⁶ This quotation comes from L.P.H.M. Buskens, 'De Gemeenschap der Moslims. Opvattingen over islamitische saamhorigheid in theorie en praktijk', in B.C. Labuschagne (ed.), *Religie als Bron van Sociale Cohesie in de Democratische Rechtsstaat?*, Nijmegen 2004, pp. 19-145, esp. p. 40. With these words, Buskens defines the essence of the idea of the secular state, although the remainder of his essay shows that he does not support it. See also Vali Nasr, 'Religion and Global Affairs: Secular States and Religious Oppositions', *Sais Review*, February 18, 1998, pp. 2-37, and John Swomley, *Religious Liberty and the Secular State, The Constitutional Context*, Buffalo, New York 1987.

³⁷ J.H.H. Weiler, *Een Christelijk Europa. Een verkennend essay, Publicaties van de rechts- en bestuurskundige afdeling van het Thijmgenootschap*, introduced and translated by Leonard Besselink and Thomas Mertens, Deventer 2004, (originally in Italian, Milan 2003).

³⁸ See Besselink and Mertens' introduction in Weiler, *Een Christelijk Europa*.

I will comment on the critique that liberal globalism generates (or fails to mitigate) a widening of the gap between the rich and the poor only in so far as it is relevant as a reflection of the liberal constitutional model. I will therefore treat the question of whether the introduction of a special class of social and economic rights is indeed a solution for the social and economic problems and the unequal distribution of wealth. I think that it is not.

As I said above, my conclusion is that the liberal ideology is superior to the available alternatives. I view the liberal outlook as universal in the sense that it should be introduced into other cultures where at present it has no firm base.

The success of liberal ideology also makes it vulnerable to reactions with undermining tendencies. One of these reactions involves the reformulation of social policies in the vocabulary of human rights. So-called economic and social rights are no part of the liberal ideology. Social and economic rights should be considered as directive principles of state policy, not as “rights” in the proper sense of the word.

2.2 MAN AS A FREE, RATIONAL AND AUTONOMOUS BEING

Eva Nieuwenhuys, the editor of this book and *auctor intellectualis* of the whole project, has pointed out the roots of liberal globalism: its view of man. The liberal outlook has its roots in the liberal view of man. Let us therefore first address liberalism’s philosophical anthropology. The liberal view of man is certainly not overly optimistic, nor, however, is it cynical. From the standpoint of liberal anthropology, man can lead his own life under the governance of reason. After the critiques which have flowed from postmodernism, vitalism, psychoanalysis, and structuralism, is it still possible to defend such a view of man?

A common distinction made in this regard is that between “modernism” and “postmodernism”. The Enlightenment principles of classical liberalism are qualified as “modernism”.¹² But modernism—so its critics contend—has properly become the target of a devastating reappraisal. This critical outlook on modernism has essential flaws. Postmodern authors maintain that man is not a free, self-governing, rational being.

¹² See on modernism: Kolocotroni, Vassiliki, & Goldman, Jane, & Taxidou, Olga (eds.), *Modernism: An Anthology of Sources and Documents* (Edinburgh University Press-Edinburgh 1998). On the Enlightenment the bibliographical material is very extensive. A recent influential book is: J.I. Israel, *Radical Enlightenment. Philosophy and the Making of Modernity 1650–1750* (Oxford University Press-Oxford/New York 2001).

Russell remained within the cadre of the liberal enlightenment view of man and cherished this vision all his life (a very long life indeed).¹⁸

Of course there were also more radical optimistic representatives of the Enlightenment and liberal tradition such as Condorcet. In the Discourse delivered on February 21, 1782 at the famous Académie française, Condorcet said:

Placés à cette heureuse époque, et témoins des derniers efforts de l'ignorance et de l'erreur, nous avons vu la Raison sortir victorieuse de cette lutte si longue, si pénible, et nous pouvons nous écrier enfin : la Vérité a vaincu ; le Genre humain est sauvé ! Chaque siècle ajoutera de nouvelles lumières à celles du siècle qui l'aura précédé ; et ces progrès, que rien désormais ne peut arrêter ni suspendre, n'auront d'autres bornes que celles de la durée de l'univers.¹⁹

A happy Age! Ignorance and falsehood finally swept away. Reason triumphant. Humanity saved—at last. This was the mood of Condorcet and some other Enlightenment thinkers. It was certainly, however, not the tone of the far more sceptical Voltaire, whose loyal apostle Condorcet only pretended to be. Nor was it the same temperament that we encounter in Immanuel Kant's classic essay on the Enlightenment, published two years after Condorcet's inaugural address. Kant wrote: "If we are asked, 'Do we now live in an *enlightened age*?' the answer is, 'No', but we do live in an *age of enlightenment*. As things now stand, much is lacking which prevents men from being, or easily becoming, capable of correctly using their own reason in religious matters with assurance and free from outside direction."²⁰ Modernity, Enlightenment, liberalism or neo-liberalism should gladly embrace this Kantian and Voltairian tradition, more than that of the optimistic attitude of Condorcet. Interestingly, the Kantian heritage was indeed the dominant tradition of Enlightenment. Thus, dominant in Enlightenment thought have been both the more cautious modernists, Russell and Freud, as well as their predecessors, (to name a few sources from the classic Enlightenment) Voltaire and Kant.²¹

¹⁸ See B. Russell, *What I Believe*, With a New Preface by Alan Ryan (Routledge-London and New York 2004 (1925)). Ryan also goes into the similarities and differences between Freud and Russell.

¹⁹ Condorcet, 'Discours prononcé à l'Académie française', in: F. Léotard & P. Wajzman, avec collaboration de C. Piat, *Paroles d'Immortels. Les plus beaux discours prononcés à l'Académie française*, Avant-propos par Jean-Denis Bredin de l'Académie française, Vol. I (Éditions Ramsay-Paris 2001) pp. 125–135, p. 129.

²⁰ I. Kant, 'What is Enlightenment?', 1784, in: Kramnick, Isaac (ed.), *The Portable Enlightenment Reader*, Edited and with Introduction by I. Kramnick (Penguin Books-Harmondsworth 1995), pp. 1–7, p. 6.

²¹ See for a radical misconceived vision on Voltaire: J. Gray, *Voltaire. Voltaire and Enlightenment* (Phoenix-London 1998). Much better is the classic: P. Gay, Voltaire's politics, *The poet as realist* (Yale University Press-New Haven and London 1988 (1959)).

It is this more realistic side of the Enlightenment, a cautious (although radical Enlightenment),²² that still can still guide us.²³ Man is a free, rational and self-governing individual in the sense that this is the vocation of man. He can reach this goal through efforts to transform culture. The Enlightenment will not realize itself through an autonomous historical process but rather through human effort. Many enlightenment thinkers were activists, philosophers (though not necessarily philosophers in the technical sense of the word) and public intellectuals. They criticized man's inability and laziness "to make use of his understanding without direction from another". Kant opened one essay with his famous definition of Enlightenment as "man's release from his self-incurred tutelage".²⁴

If we study the dominant view of man held by those theoreticians who subscribe to liberal globalism, we also see that it is the more realistic anthropology of Voltaire and Kant, not the minority viewpoint of Condorcet.

A *locus classicus* for this sensible tradition within Enlightenment thought is the plea made by James Madison for the rule of law, based on a realistic anthropology. Madison was one of the founding fathers of the American constitution. Together with Hamilton and Jay, in 1787 he wrote, the *Federalist Papers*, the first great exposition of the ideas behind (and included in) the American constitution. Just as Jefferson is considered to be the man behind *The Declaration of Independence*, so Madison was the man behind *The Federalist Papers*.

2.3 IF MEN WERE ANGELS

We find Madison's view of man set out in *The Federalist*, no. 51 where he says:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²⁵

²² See J.I. Israel, *Radical Enlightenment. Philosophy and the Making of Modernity 1650–1750* (Oxford University Press-Oxford/New York 2001).

²³ See for instance: S. Rushdie, 'Do we have to fight the battle for the Enlightenment over again?' in: *The Independent*, 22 January 2005.

²⁴ Kant, *Ibid.* 1.

²⁵ Madison in: J. Madison, A. Hamilton, J. Jay, *The Federalist Papers*, Isaac Kramnick (ed.) (Penguin Books 1987 (1788)), essay no. 51, pp. 319–320.

Let us try to deduce the central elements of this passage. The central idea is a view of man. Man is no angel. If men were angels, people would not harm each other. You would need no police, no army, no weapons, and no private property. Life would be a paradise on earth. But, we all know such a life is an unattainable utopia. People can be nasty and vicious, and therefore we need an organisation to protect us from the criminals and hooligans. For that organisation to be successful, it needs power. Perhaps not the unlimited power of the Hobbesian Leviathan, but power nonetheless.²⁶

Here we encounter a problem. That organisation, the state or government, is run by men. And men are no angels. This truth applies to people in the sense of citizens as well as to the rulers of such a state. Thus, we must consider what sort of mechanisms might be developed to control the controllers. It was for this purpose that democracy and the rule of law were invented.

The Federalist Papers present a theory of the state with two elements. First, the state is (and needs to be) a concentration of power. Second, the power of the state must be limited. And, a balance must exist between the two.

2.4 THE STATE AS CONCENTRATION OF POWER

Many people, particularly legal scholars, tend to overestimate the “ideal dimension” of the state: the limitation of state power by means of law and democracy. Judged from the perspective of legal bias, that overestimation is understandable, but one-sided nevertheless. Security and order provide the basis for determining statehood. Without effective control over the territory of the state, no state exists. Thus, the rule of law, democracy, human rights—all—necessarily presuppose the existence of a state. The distinction is critical between security and control on the one hand and ideals such as freedom of speech, freedom of movement and many other civil liberties on the other. A state without freedom of speech may not be a good place to live (It would not be deemed a “constitutional state” or a “state under the rule of law”), but such a state *can* exist. That’s the reason why some writers, such as Hobbes, Machiavelli, Von Treitschke and Carl Schmitt, laid heavy emphasis on the power of the state. “Der Staat ist Macht”, Von Treitschke said. Carl Schmitt, when considering the nature of the constitutional state, writes that it presupposes *the state*: “Der Staat selbst, der kontrolliert werden soll, wird in diesem

²⁶ See Hobbes, Thomas, *Leviathan*, Richard Tuck (ed.) (Cambridge University Press-Cambridge 1996 (1651)).

System vorausgesetzt." Schmitt approvingly quotes Mazzini: "Die Freiheit konstituiert nichts".²⁷

A contemporary representative of this tradition is the British philosopher John Gray. In his book *Heresies*, he makes a plea for a strong state: "Better the Hobbesian clarity of Ronald Rumsfeld than the unpredictability and bombast of Bill Clinton."²⁸ At the beginning of the 20th century, it was the strong state that posed a problem. Nowadays, it is the weakness of the state that poses the greatest threat. In many parts of the world *the state* has fallen apart.²⁹ Gray points to liberal ideology as bearing the responsibility for this deterioration. "Liberals—mesmerized by the terrible record of state-sponsored crimes against humanity—continue to believe that the main challenge of politics is to limit state power. Believing there are human freedoms that must never be violated, they insist that everything governments do be consistent with human rights."³⁰ According to Gray this is wrong. "At bottom, the state exists to secure peace. Whenever peace is at odds with liberty, it is always liberty that loses out. As Hobbes knew, what human beings want most from the state is not freedom but protection. This may be regrettable, but building a political philosophy on the denial of human nature is foolish."³¹ If you want to be free, you need first to be safe. "For that, you need a strong state."³²

2.5 THE STATE UNDER THE RULE OF LAW

Nevertheless, once that a state exists, one can think about its potential for growing into an "optimum state". Once life is realized, we can ponder over the good life. The ideal of the state in many parts of the world is a state under the rule of law. The ambition to subject state power to the rule of law is called *constitutionalism*.

Initially the British made a great contribution to constitutionalism. According to the great scholar A.V. Dicey constitutionalism meant subjecting the state to ordinary law.³³ This principle, the principle of legality, was considered, in fact, to be the ABCs of constitutionalism.

²⁷ C. Schmitt, *Verfassungslehre, Sechste, unveränderte Auflage* (Duncker & Humblot-Berlin 1983 (1928)), p. 200.

²⁸ J. Gray, *Heresies. Against Progress and Other Illusions* (Granta Books-London 2004), p. 97.

²⁹ R.D. Kaplan, 'The Coming Anarchy' (1994), in: *The Coming Anarchy. Shattering the Dreams of the Post Cold War* (Random House-New York 2000), pp. 3–59.

³⁰ Gray, *Ibid.* p. 109.

³¹ Gray, *Ibid.* p. 110.

³² Gray, *Ibid.* p. 114.

³³ Advocated in: A.V. Dicey, *Introduction to the Law of the Constitution*, Tenth edition, with introduction by E.C.S. Wade (Macmillan Education-London 1987 (1885)).

scribes the rules of the community. The judicial department is the weakest branch: it needs the power of judicial review to redress this imbalance.

This passage from the Federalist Papers was the source of inspiration for John Marshall, Chief Justice of the United States Supreme Court, to introduce judicial review into the American constitutional system in the epochal case *Marbury v. Madison* in 1803. Marshall said:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

And then the famous words follow: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by any ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary legislative means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it."³⁵

These words have been of great significance to the modern concept of higher law. Marshall integrated judicial review as an essential element into the modern concept of constitutionalism.

2.6 IS LIBERAL GLOBALISM A UNIVERSAL IDEAL?

The model of a democratic state under the rule of law is—to my mind—a universal ideal. It is not a specific preoccupation of Western man but of man in general. Why?

This has to do with the universality of the view of human nature as expounded by Madison. I do think there are some universals with regard to human nature. There was no golden state of nature (as Seneca thought) or (as the Bible describes) a state we have fallen from and can return to.³⁶ Nor will there be a future historical stage where human nature will be radically different from what it is now (as Trotsky thought would be

³⁵ See on this case: R.L. Clinton, 'Precedent as Mythology: A Reinterpretation of *Marbury v. Madison*', in: *The American Journal of Jurisprudence* (1990), pp. 55–86.

³⁶ See J.B. Bury, *The Idea of Progress. An Inquiry into the Origin and Growth* (MacMillan and Co.-London 1920), p. 15.

the world? Safranski characterizes individualism as one of the most important achievements of the political and philosophical culture of Europe ("Errungenschaft der politischen und philosophischen Kultur Europas"). Individualism in this sense is based on the idea of the plurality of cultures and interests. Europe's history is intimately connected with the idea that the state and society have to be organized in a way that allows human individuality to "flourish and develop" ("Diese normative Entscheidung ist mit der Idee verbunden, Staat und gesellschaftliches Leben müssten so organisiert werden, dass Menschen ihre Individualität voll entfalten können, ohne sich wechselseitig dabei zu behindern.")⁴³

This is all very well, but Safranski does not seem to realize that these are all liberal ideals. His plea is in the great tradition of John Stuart Mill's glorification of individual freedom in *On Liberty*.⁴⁴

Another former liberal who developed into a vehement critic of liberalism and of Enlightenment ideals is the British philosopher John Gray. According to Gray, Western societies are governed by the belief that modernity is a single condition—everywhere the same and always benign. "As societies become more modern, so they become more alike. At the same time they become better. Being modern means realising *our* values—the values of the Enlightenment, as we like to think of them."⁴⁵ Gray speaks of "Enlightenment faith" that spilled over into the 19th century positivism of August Comte and others. As we have seen before, the world view that Gray characterizes as that of "The Enlightenment" is simply only from one of its specific but varied strands. It is the optimistic way of thinking exemplified by Condorcet. But, it is certainly not Enlightenment *tout court*. It not even a dominant tradition within Enlightenment thought.

In his later work Gray becomes more and more radical. In one of his last collection of essays he rejects the idea of knowledge in general. "In modern times", he tells us, "nothing is more heretical than the idea that knowledge can be a sin, and it is this thought that inspires the essays that are collected here."⁴⁶ What could that mean—the conviction that knowledge can be a sin—? Of course, knowledge can be used in a way that is inimical to important human ideals, such as the knowledge of chemistry for the fabrication of chemical weapons. But should that imply that knowledge itself is a sin? And what would "sin" mean in this

⁴³ Safranski, *Ibid.* p. 75.

⁴⁴ J.S. Mill, *On Liberty* (Penguin Books-Harmondsworth 1977 (1859)).

⁴⁵ J. Gray, *Al Qaeda and what it means to be modern* (Faber and Faber-London 2003), p. 1.

⁴⁶ J. Gray, *Heresies. Against Progress and Other Illusions* (Granta Books-London 2004), p. 6.

the world.⁵³ There is in this a strong convergence among political systems in the world. The world is increasingly a global political order in the sense that democracy and the rule of law are the norm almost everywhere. That does not only apply to the Western world, but to other parts of the world as well. In that sense liberalism has a global significance, a fact that even its severest critics do not deny.

We have to distinguish, though, between two meanings of liberal Globalism. The first meaning is descriptive. A "liberal globalist" can claim that *in fact* the political order of the world is one. Everywhere countries try to be democracies and states under the rule of law. It was Francis Fukuyama who, in his thesis on the end of history, formulated this aspect of liberal globalism. Political history has come to an end. Everywhere liberal democracy is the model governments try to achieve.⁵⁴ His theory has come under heavy criticism,⁵⁵ but substantially, I believe, his thesis remains firm.

There is also another meaning of the term "liberal globalism", one in the normative sense. If you subscribe to liberal globalism in this normative sense you see liberal democracy as the best model for political governance. Personally I do. And, having done so, I see no reason to withhold this model from other people. This conviction has much to do with Madison's reflection on human nature. Madison is right. Men are no angels. They never were, and they never will be. I conclude that there must be one (and the same) political model that is applicable to all of mankind.

Now that I have proclaimed liberal globalism as a universal ideal for all people and all nations, I want to address a specific characteristic of the American political tradition that distinguishes it from the European model. What strikes the attentive student of the American political system is the absence of what might be characterized as *social* constitutional rights. Why is this so? And should we, Europeans, also follow the American example in this respect?

⁵³ See C.J. Friedrich, *The Impact of American Constitutionalism Abroad* (Boston University Press-Boston, Massachusetts 1967).

⁵⁴ F. Fukuyama, 'The End of History?', in: *The National Interest*, No. 16, Summer 1989, pp. 3-18, also in: P. Schumaker, D.C. Kiel, T.W. Heilke (eds.), *Ideological Voices. An Anthology in Modern Political Ideas* (The McGraw-Hill Companies, Inc.-New York etc. 1997), pp. 409-417.

⁵⁵ Implicitly but in an influential way by S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster-New York 1996).

(previously presented as a lecture in 1949) titled *Citizenship and Social Class* wherein he advocated a new conception of citizenship. Modern citizenship would make an orientation on social rights necessary.⁶⁵

Why is this not a good plan? Why is this step a deviation from the model of liberal democracy as defended in the classic American tradition of the founding fathers not an improvement to but a deterioration of the ideal of liberal democracy? I think there are three arguments against the introduction of social and economic rights as a new class of human or constitutional rights.

2.9 THREE ARGUMENTS AGAINST THE FOUR FREEDOMS

(i) *Social constitutional rights disturb the separation and balance of state powers.* One of the first arguments against the introduction of social constitutional rights is that it disrupts the sound idea of the separation and balance of state powers. According to the well known theory of Montesquieu⁶⁶ and others, a distinction should be made between the making of laws under the legislative powers, the administration of law under the executive powers, and the making of judicial judgments as performed by the judiciary. There should be a particular balance between the different branches of the state. Judicial review is legitimate under the condition that the exercise of the judicial power does not exceed its limits and transgress into matters that are within the sole province of the legislative or the executive.

(ii) *Social constitutional rights undermine the democratic idea.* Another problem with treating social and economic rights as constitutional rights is that such treatment necessarily would withhold from the people the power to govern their own affairs. A.V. Dicey formulated the democratic idea in 1885 with the British constitutional system in mind: that it is *Parliament* who is responsible for politics and that the judiciary has to conform to this division of powers.⁶⁷ Although this principle is less strictly applied

⁶⁵ T.H. Marshall, 'Citizenship and Social Class', in: T.H. Marshall, *Class, Citizenship and Social Class* (Doubleday 1963), quoted here in: R.E. Goodin and P. Pettit, *Contemporary Political Philosophy. An Anthology* (Blackwell, Cambridge (Mass.) and Oxford 1997), pp. 291–319.

⁶⁶ Montesquieu, *Oeuvres complètes*, II, Texte présenté et annoté par R. Caillois (Éditions Gallimard 1951) (De l'Esprit des lois, Chapitre VI, De la Constitution d'Angleterre), pp. 396–407.

⁶⁷ A.V. Dicey, *Introduction to the Law of the Constitution*, Tenth edition, with introduction by E.C.S. Wade (Macmillan Education-London 1987 (1885)).

in the 21st century than was the case in the 19th century, it still provides a viable point of departure.⁶⁸ It is still this attitude that lies behind much criticism of the rights revolution in general. "The proposals for a written constitution, for a Bill of Rights, for a House of Lords with greater powers to restrain governmental legislation, for regional assemblies, for a supreme court to monitor all these proposals, are attempts to write laws so as to prevent Her Majesty's Government from exercising powers which hitherto that government has exercised", according to J.A.G. Griffith.⁶⁹ Where it all comes down to is the desire to substitute politics for law. And this is an impossible undertaking.⁷⁰ Law cannot take the place of politics. "They merely pass political decisions out of the hands of politicians and into the hands of judges and other persons", comments Griffith on those utopians who try to force a bill of rights on the British system.⁷¹

(iii) *Social constitutional rights undermine the budgetary right of the legislative.* Intimately connected with these two sets of arguments, just discussed previously, is the further point that social rights as constitutional rights would undermine the right of legislature to control the purse strings.

To understand what this argument means, let us go back to the Federalist papers, in particular No. 78 written by Alexander Hamilton. There, Hamilton proposes to "attentively consider the different departments of power."⁷² "The Executive", writes Hamilton, "not only dispenses the honours but holds the sword of the community". As for powers of the legislature, it can be said that this branch "not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated." And, as for the judiciary, Hamilton asserted that this branch was to have no influence over the sword or the purse. The judiciary "can take no active resolution whatever".

⁶⁸ See C.M. Zoethout, 'Rechten van de mens na vijftig jaar "thuisgebracht". Labours voorstel de Europese Conventie te incorporeren in het Britse rechtstelsel', in: *NJB*, 12 juni 1998, pp. 1067–1072 and J. Goldworthy, *The Sovereignty of Parliament. History and Philosophy* (Clarendon Press-Oxford 1999).

⁶⁹ J.A.G. Griffith, 'The Political Constitution', in: *The Modern Law Review*, Vol. 42, No. 1, 1979, pp. 1–21, p. 16.

⁷⁰ See for a more extensive critique of rights-talk: J. Waldron, 'A Right-Based Critique of Constitutional Rights', in: *Oxford Journal of Legal Studies*, 13 (1993), pp. 18–51; M.A. Glendon, *Rights Talk. The Impoverishment Of Political Discourse* (The Free Press-New York 1991); C. Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?* (Westview Press, Boulder, Oxford 1999).

⁷¹ Griffith, *Ibid.* p. 16.

⁷² J. Madison, A. Hamilton and J.I. Kramnick (ed.), *Federalist papers* (Penguin Books-Harmondsworth 1987), p. 437.

It is on the basis of these considerations that Hamilton considers that the judiciary “from the nature of its functions, will always be the least dangerous to the political rights of the constitution.” Hamilton would thus be shocked if he were to learn what power the judiciary nowadays exercises. Dicey would share his feeling were he to read the plans for a Bill of Rights for Britain.

If social constitutional rights were ever to be acknowledged in the sense that allowed them the same status as classic rights, the judicial power would be almost limitless. The judiciary would have power over the “purse”, and this should never happen—not even with all the “wisdom” of the world. The “least dangerous branch” would transform itself in—in the words of Max Weber—kadi-justiz (a government by judges).⁷³

2.10 WHAT TO DO WITH THE SOCIAL AND ECONOMIC RIGHTS AS FORMULATED?

Let us suppose now that social politics can best be formulated by the government. The question still remains: what to do with the social and economic rights which already have been granted constitutional status? What to do with the social rights in the ICESCR? Should we abolish them? That seems not to be a very realistic option. It appears that we are already caught in a dangerous trap. Realizing social and economic rights would ruin our system of separated powers and transform a democracy in a kind of judicial dictatorship. Abolishing the social rights already integrated into our constitution and international agreements is practically impossible. What we could do, I think, is twofold: (1) maintain the existing structure but interpret social rights in a more realistic way and (2) refrain from creating new social constitutional rights. The use of the vocabulary of efforts and application of directive principles would be an improvement over the present situation. We should interpret what have been called “social rights” as “directive principles of state policy” and not as present rights, as is the case with the classic rights.

2.11 SOCIAL RIGHTS AS “DIRECTIVE PRINCIPLES”

How to properly address social rights as directive principles is something many Western constitution-makers can learn from constitution-makers from other parts of the world.

Consider the constitution of Namibia which contains a Chapter 11 “Principles of State Policy”. These principles are introduced in Art. 95

⁷³ See P. Dassen, *De onttoovering van de wereld. Max Weber en het probleem van de moderniteit in Duitsland, 1890–1920* (Uitgeverij G.A. van Oorschot-Amsterdam 1999), p. 175.

with the words "The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following". What follows is that legislation always has to conform to the equal treatment of men and women; legislation has to aim at realizing the health of the workers; all citizens have an equal share in the public facilities of the state.

This is not the language of rights ("rights-talk"), but rather the language setting out what efforts that the state must make to realize certain aims. "The State shall endeavour to ensure that in its international relations it (. . .)" and what follows is the way the state wants to conduct itself in its international relations (Art. 96). That is also manifest in the way asylum is treated in the constitution. There is no *right to asylum*; the formulation is different: "The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group."

Apart from these principles of state policy, there is a separate chapter on "Fundamental Human Rights and Freedoms". There we find: "a right to life shall be respected and protected" (Art. 6). The death penalty is also rejected: "No law may prescribe death as a competent sentence". And here we also find the classic rights to freedom of speech, liberty, human dignity, fair trial and privacy. A peculiar feature of the Namibian constitution is that it has a provision on the rights of children. A child has the right to a name, nationality and legislation that protects the interests of children. To avoid the language of rights there are various options. Sometimes one speaks of "entitled to", in other occasions different words are used.

A second example is drawn from the constitution of Nigeria. The constitution of Nigeria also acknowledges directive principles of state policy. In Chapter Two we encounter the formulation: "Fundamental Objectives and Directive Principles of State Policy". Art. 14 reads: "It shall be the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this chapter." The Federal Republic of Nigeria is qualified in Art. 15 as a state based on the principles of democracy and social justice.

Again: this is not the language of rights, but of ideals. "The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution (. . .)" and what follows is that the economy should be instituted that maximizes prosperity, freedom and the happiness of every single citizen. A little further on it says: "The State shall direct its policy towards ensuring (. . .)".

Apart from these obligations falling on the state, there are also obligations falling on the citizens. Art. 24 proclaims it the duty of every citizen to respect the constitution; to protect public property; the prestige and good name of the country; to defend democratic processes and practices and participate therein. These principles of state policy have a supplementary provision in the "Fundamental Rights" of Chapter four, where we find the traditional list of human rights that we Europeans are so familiar with.

A third illustration is the constitution of India. In Chapter four it is explicitly stated that the directive principles are not justiciable. Art. 37 reads: "The provisions contained in this part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." So the constitutional lawmaker contradicts the widely held view that principles have to be justiciable in order to be important.

We also find in the constitution of India formulations that make it clear that they require an effort from the state to realize certain social goals. "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life", according to Art. 38.1 of the Indian constitution. The language of "striving" (and not of rights) we also find in the second part of this article: "The State shall, in particular, strive to minimise the inequalities of income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

2.12 BETWEEN LETTERS TO SANTA CLAUS⁷⁴ AND REAL RIGHTS

If the language of efforts and directive principles of state policy as an alternative for the language of social rights is a serious option, the classic opposition between those who reject social rights and those who advocate the realisation of those rights is recnsilable. What stimulates much of the controversy between the two camps is the failure to address the appropriate topics for discussion. It is perfectly possible to advocate that

⁷⁴ See C. Orwin and T. Pangle, 'The Philosophical Foundations of Human Rights', in: M.F. Plattner (ed.), *Human Rights in Our Time*, 1984, pp. 1-22, p. 15 who qualify social constitutional rights as letters to Santa Claus.

particular tasks fall to the state in the field of poverty relief and redistribution of wealth on moral and political grounds and at the same time to reject the use of the language of social rights for constitutional reasons. The values of social justice and equality are simply not adequately protected behind a rhetorical façade of social “rights”. Social ideals are better served when presented as directive principles of state policy than as real rights.⁷⁵

One may be inclined to consider this view as a kind of radical libertarianism that has lost all contact with the reality of present day constitution making.⁷⁶ This would not be accurate, however. Steiner and Alston rightly say that the proclamation of human rights as “universal, indivisible and interdependent and interrelated (Vienna Declaration, para 5)” is misleading: “this formal consensus masks a deep and enduring disagreement over the proper status of economic, social and cultural rights.”⁷⁷

The proclamation of the indivisibility of rights in the Vienna Declaration is an illusion. Not all rights are of the same importance. Not everything that is proclaimed in formal treaties and constitutions is realistic. In many cases there is an utopian element at play. What is proclaimed is something that perhaps one day may *become* a right—and even that can be contested on the grounds mentioned above.

It is not very likely that within the foreseeable future the status of social rights will change. Again Steiner and Alston are more realistic than many other commentators when they write: “with the rejection of communism, the widespread embrace of free-market economic solutions and increasing global economic and social integration, economic and social rights are certain to remain at the center of controversy in the years ahead.”⁷⁸

⁷⁵ See also: E. Mureinik, ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’, in: *South African Journal of Human Rights*, no. 8, 1992, pp. 464–474.

⁷⁶ See for a well argued defence of libertarianism: M.N. Rothbard, *The Ethics of Liberty*, with a new introduction by Hans-Hermann Hoppe (New York University Press-New York and London 2002 (1998)).

⁷⁷ H.J. Steiner and P. Alston (ed.), *International Human Rights in Context. Law; politics, morals, Text and Materials* (Clarendon Press-Oxford 1996), p. 256.

⁷⁸ Steiner and Alston, *Ibid.* p. 257.